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(Consolidated with Nos. 80-895 and 80-936)

In the
Supreme Court of the United States
OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI,

Petitioners,

vs.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION OF TEN UNITED STATES COMMODITY EXCHANGES FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF TEN UNITED STATES COMMODITY EXCHANGES FOR LEAVE TO FILE BRIEF AMICI CURIAE

The EXCHANGES[1] respectfully move, pursuant to Rule 36 of this Court, for leave to file the accompanying

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[1] Board of Trade of the City of Chicago; Board of Trade of Kansas City, Mo., Inc.; Chicago Mercantile Exchange; Citrus Associates of the New York Cotton Exchange, Inc.; Coffee, Sugar & Cocoa Exchange, Inc.; Commodity Exchange, Inc.; MidAmerica Commodity Exchange; Minneapolis Grain Exchange; New Orleans Commodity Exchange; and New York Cotton Exchange. (The New Orleans Commodity Exchange was not a designated contract market in December 1980 and, therefore, did not participate in the EXCHANGES' earlier brief).

brief *amici curiae* in support of the petitioners. Certiorari was granted on February 23, 1981, as was the EXCHANGES' December 19, 1980 motion for leave to file a brief *amici curiae* in support of the petition.

The petitioners have again consented to the EXCHANGES' appearance as *amici curiae*. The respondents have again refused such consent.

At issue before the Court is whether the Second Circuit erred when it held in a two-to-one decision that a private cause of action for damages may be implied against a commodity exchange and its officials for alleged violations of the Commodity Exchange Act (7 U.S.C. §§1-25).

The EXCHANGES, like the petitioner New York Mercantile Exchange, are federally-designated commodity exchanges on which futures contracts may be lawfully traded in the United States. Over 90 million futures contracts were traded through their facilities in 1980 alone. By virtue of the size, scope, and importance of the EXCHANGES' international markets, and the accompanying duty to police those markets, their vulnerability to private suits is enormous and the potential impact devastating.

The decision of the Second Circuit immediately and directly affects several of the EXCHANGES. For example, the Chicago Board of Trade and the Commodity Exchange, Inc., are defendants in an action pending in the United States District Court for the Southern District of New York (*Selig Strax* v. *Commodity Exchange, Inc., et al.*, No. 79 Civ. 5366) in which damages of more than one billon dollars are sought against

these exchanges for alleged violations of the Commodity Exchange Act.[2]

As outlined in our earlier brief in support of the petition, important aspects of the pertinent legislative history and the legislative scheme, critical to proper determination of the question raised in this case, simply were not considered by the Second Circuit. The EXCHANGES believe that our analysis of these aspects, which we highlighted in our earlier brief but which were not addressed in the petition, would be of material aid to the Court.

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[2]Additionally, Citrus Associates of the New York Cotton Exchange, Inc. is a defendant in an action pending in the Southern District of New York, predicated on alleged violations of the Commodity Exchange Act, which seeks damages against the Citrus Associates in the amount of 5 million dollars. *Nancy Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc., et al.*, No. 78 Civ. 178. Commodity Exchange, Inc., is a defendant in another action pending in the Southern District of New York, also predicated on alleged violations of the Commodity Exchange Act, which seeks damages against the Exchange in excess of 100 million dollars. *Republic National Monetary Corp.* v. *Commodity Exchange, Inc., et al.*, No. 80 Civ. 5397. Also, the Chicago Board of Trade is a defendant in two actions pending in the Northern District of Illinois, predicated on alleged violations of the Commodity Exchange Act, which seek damages against the Board in excess of 5.6 million dollars. *Philip Smith* v. *Richard Groover, et al.*, No. 77 C 2297; *Samuel Friedman* v. *Bache Halsey Stuart Shields, Inc., et al.*, No. 80 C 1111.

WHEREFORE, the EXCHANGES respectfully request this Court for leave to file their brief *amici curiae* submitted herewith.

Respectfully submitted,

.....

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April 9, 1981

QUESTION PRESENTED

Whether it was the intent of Congress that federally-designated commodity exchanges and their officials, which operate and act under pervasive federal regulation and are subject to severe penalties and sanctions for noncompliance with their duties under the Commodity Exchange Act, and which have been specifically exempted or excluded from every provision of the Act creating private causes of action for damages, should nevertheless be subject—by implication alone—to private damage claims under section 5(d), 5a(8), or 9(b) of the Act [7 U.S.C. §7(d), 7a(8), or 13(b)].

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BRIEF AMICI CURIAE OF TEN UNITED STATES COMMODITY EXCHANGES IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of the EXCHANGES,[1] as *amici curiae,* in support of the petitioners, whose petition for writ of certiorari was granted on February 23, 1981.[2]

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[1] See note 1 of the accompanying Motion.

[2] The Court's Order of February 23, 1981 also granted the EXCHANGES' December 19, 1980 motion for leave to file a brief *amici curiae* in support of the petition.

The petitioners New York Mercantile Exchange and its officials seek reversal of the decision in *New York Mercantile Exchange* v. *Leist*, 638 F.2d 283 (2d Cir. 1980), where the Second Circuit held in a two-to-one decision that federally-designated commodity exchanges and their officials may be sued for unlimited damages for alleged violations of the Commodity Exchange Act (7 U.S.C. §§1-25).

The Second Circuit arrived at this far-reaching result notwithstanding the fact that the Act does not provide for any such private suit; nothing in the pertinent legislative history evidences any congressional intent whatsoever to create, by implication, private causes of action against exchanges and their officials; and, to the contrary, Congress has assiduously avoided creating such causes of action on numerous occasions, beginning with its earliest legislative actions in 1921 and as recently as the latest revision of the Act in 1978.

Subsequent to the Second Circuit's decision, and prior to the Court's order granting certiorari, the United States Court of Appeals for the Fifth Circuit rejected the Second Circuit's analysis, holding that a private cause of action against a commodity brokerage firm cannot be implied under the Commodity Exchange Act. *Rivers* v. *Rosenthal & Company*, 634 F.2d 774 (5th Cir. 1980), *petition for cert. filed*, No. 80-1542. Although *Rivers* does not expressly address the question of exchange and exchanged-related liability under the Act, its reasoning clearly applies a *fortiori* to this case.

NATURE AND INTEREST OF THE EXCHANGES

The EXCHANGES, like the petitioner New York Mercantile Exchange, are federally-designated commodity ex-

changes on which futures contracts may be lawfully traded in the United States. By law (the Commodity Exchange Act) such trading may be conducted only by and through members of these eleven exchanges, as well as the recently designated New York Futures Exchange (a subsidiary of the New York Stock Exchange), in accordance with exchange rules and the provisions of the Commodity Exchange Act. (See 7 U.S.C. §§6, 6b, 6c, 6h.)

Located in Chicago, Kansas City, Minneapolis, New Orleans, and New York City, the EXCHANGES operate as not-for-profit institutions to provide international markets for futures trading in agricultural and forest products, metals, rubber and petroleum products, foreign currencies and financial instruments. Thousands of producers and commercial users of these commodities throughout the world avail themselves of the EXCHANGES' diverse markets. In 1980, over 90 million contracts were traded on the EXCHANGES, representing billions of dollars worth of commodities.[3]

As duly designated "contract markets" under the Commodity Exchange Act, the EXCHANGES' mandated activities are not those of private commercial ventures. Since the enactment of a federal futures trading law in 1921, Congress has assigned to commodity exchanges the duty to police their marketplaces and to act as supplements to the federal government in achieving the public-protection objectives of the law (now the Commodity Exchange Act). By virtue of the size, scope and importance of their markets, and the accompanying duty to

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[3] "The importance of futures trading to the general public and to the Nation equals the importance of the securities markets." [Sen. Rep. No. 93-1131, 93d Cong., 2d Sess. 19 (1974)].

police those markets, the EXCHANGES' vulnerability to private damage suits is enormous, and the impact is potentially devastating.[4]

SUMMARY OF ARGUMENT

Private causes of action against commodity exchanges and their officials are not expressly provided for in the Commodity Exchange Act. Nor is there any persuasive evidence that Congress intended to create such causes of action by implication. A thorough review of the legislative history of the pertinent sections of the Commodity Exchange Act demonstrates that Congress has never expressed any intention to implicitly create such private causes of action.

To the contrary, Congress has assiduously avoided doing so on a number of occasions, and has insulated commodity exchanges and their officials from the only private causes of action expressly provided for in the Act. Moreover, implying such causes of action would frustrate the legislative scheme of the Act, a result which Congress most certainly could not have intended.

Thus, as recognized by the Fifth Circuit in the *Rivers* case [634 F.2d 774 (1980)], the decision of the Second Circuit is irreconcilable with the decisions of this Court, most particularly the recent decisions in *Touche Ross & Co.* v. *Redington,* 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11 (1979); *Kissinger* v. *Reporters Committee for Freedom of the Press,* 445 U.S. 136 (1980); and *Universities Research Association, Inc.* v. *Coutu,* 49 U.S.L.W. 4354 (April 6, 1981).

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[4] Pending litigation against the EXCHANGES under the Commodity Exchange Act is detailed at note 2 (and preceding text) of the Motion accompanying this brief.

ARGUMENT

Congress Did Not Create, and Did Not Intend to Create by Implication, A Private Cause of Action Under Section 5(d), Section 5a(8), Or Section 9(d) of the Commodity Exchange Act against A Commodity Exchange and Its Officials.

The "central inquiry" and "dispositive question" in determining whether a private cause of action exists under a particular statutory provision is "whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 24 (1979).[5]

Sections 5(d), 5a(8), and 9(b) of the Commodity Exchange Act [7 U.S.C. §§7(d), 7a(8, 13(b)][6] create no express private causes. The Commodity Exchange Act nowhere else provides for such causes against a commodity exchange and its officials, but does expressly provide other means for judicial and administrative enforcement. Thus,

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[5] See also *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980).

[6] Section 5(d) requires, as a condition for licensing a commodity exchange as a "contract market," that the exchange's governing board provide for "the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators" upon such exchange. Section 5a(8) requires, as a further condition for licensing, that each contract market enforce its rules relating to contract terms and other trading requirements which have been approved by the Commodity Futures Trading Commission ("CFTC"). Section 9(b) makes it a felony, *inter alia*, to manipulate or attempt to manipulate commodity prices.

the question is whether Congress intended to create any such cause *by implication.* Such intent must be demonstrated by "persuasive evidence," and in this connection, the focus must be on Congress' intent *at the time the particular statutory provision in question was enacted. Redington,* 442 U.S. at 571, 575 n. 16, 576; *Transamerica Mortgage,* 444 U.S. at 20.

The majority in *Leist* failed altogether to follow this analytical approach and, instead, relied substantially on certain lower court decisions rendered prior to 1974 to advance the proposition that private causes are to be implied *generally* under the Commodity Exchange Act. See 638 F.2d at 300. *Not one of these earlier decisions analyzed the pertinent legislative history.* To the extent a rationale was advanced by them for implying a private cause, it is the long-repudiated test of the *Restatement of Torts.*

The following analysis of the legislative histories of sections 5(d), 5a(8), and 9(b) of the Commodity Exchange Act—as well as subsequent legislation amending the Act in 1974 and 1978, and the overall scheme of the Act—clearly establishes that Congress did *not* intend to create, by implication, private causes of action under those provisions against commodity exchanges and their officials.

A. The 67th Congress (1921 and 1922) Did Not Intend to Create, By Implication, A Private Cause of Action Under Section 5(d).

Section 5(d) [7 U.S.C. §7(d)] is a carryover (substantially *in haec verba*) from section 5(d) of the Future Trading Act of 1921 (Act of August 24, 1921, ch. 86,

42 Stat. 187).[7] The purpose of that legislation, as stated by its House sponsor, was for the protection of *producers*, and was specifically directed *against speculators*. See 61 *Cong. Rec.* 1314 (May 11, 1921) (remarks of Rep. Tincher); see also 61 *Cong. Rec.* at 1318 (remarks of Rep. Purnell); 61 *Cong. Rec.* 4761, 4765 (Aug. 9, 1921) (remarks of Sen. Capper, the Senate sponsor); 62 *Cong. Rec.* 12720-12725 (Sept. 15, 1922).

All of section 5, including subsection (d), is, and was clearly intended to be, a licensing requirement. See, *e.g.*, 61 *Cong. Rec.* 1318, 1325 (remarks of Rep. Purnell). Its purpose is simply to require that commodity exchanges, in order to be licensed, must have rules and regulations (*administrative machinery*) to deal with manipulation, and the CFTC (then the Secretary of Agriculture) "is to determine whether they have adopted proper rules" as

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[7] Section 5(d) of the Future Trading Act of 1921 authorized designation of an exchange as a "contract market" "[w]hen [*inter alia*] the governing board thereof provides for the prevention of manipulation of prices, or the cornering of any grain, by the dealers or operators upon such board." (42 Stat. 188). Following the Supreme Court's decision in *Hill* v. *Wallace*, 259 U.S. 44 (1922), declaring aspects of the 1921 Act unconstitutional, this language was reenacted verbatim as section 5(d) of the Grain Futures Act of 1922 (Act of September 21, 1922, ch. 369, 42 Stat. 998). (The commas separating the phrase "or the cornering of any grain" were deleted, however). The constitutionality of the 1922 Act was upheld in *Board of Trade* v. *Olsen*, 262 U.S. 1 (1923). In 1936, the Act was renamed the Commodity Exchange Act, and section 5(d) was amended by substituting "commodity" for "grain" and "and" for "or" in the phrase "or the cornering of any grain." [Act of June 15, 1936, ch. 545, §§1, 6(b), 49 Stat. 1491, 1497]. Section 5(d) has not been amended since 1936. See *Leist*, 638 F.2d. at 293-94.

part of its licensing procedures. 61 *Cong. Rec.* 1390 (May 12, 1921) (remarks of Rep. Chindblom). See also 61 *Cong. Rec.* 5559 (Aug. 23, 1921) (remarks of Rep. Haugen); *Hill* v. *Wallace*, 259 U.S. 44, 64; *Hearings Before the Senate Committee on Agriculture and Forestry on H.R. 6772*, 74th Cong., 2d Sess. 246 (1936) (testimony of W. Berge, Special Ass't to the Attorney General); "Federal Regulation of Commodity Futures Trading," 60 *Yale L. J.* 822, 834 (1951).

There is nothing in the legislative history of section 5(d)—either at its enactment in 1921, its reenactment in 1922, or its technical amendment in 1936[8]—that in any way suggests that Congress intended to create a private cause of action under this licensing provision against a commodity exchange and its officials.[9] See *e.g.*, 61 *Cong. Rec.* 1312-1341 (May 11, 1921); 62 *Cong. Rec.* 12720-12725 (Sept. 15, 1922).[10]

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[8] See note 7.

[9] In this regard, it should be noted that section 5(d) was enacted well before the so-called "judicial rush" to imply private causes of action. See *Leist*, 638 F.2d at 296; also at 344 (Mansfield, J., dissenting). Regarding the implication of private causes under licensing requirements, see *Redington*, 442 U.S. at 569 (basis for implication lacking).

[10] See also:

1921: H. R. Rep. No. 44, 67th Cong., 1st Sess. (1921); S. Rep. No. 212, 67th Cong., 1st Sess. (1921); H. R. Rep. No. 345, 67th Cong., 1st Sess. (1921); H. R. Rep. No. 362, 67th Cong., 1st Sess. (1921); 61 *Cong. Rec.* 1312-1341 (May 11, 1921); 61 *Cong. Rec.* 1366-1399 (May 12, 1921); 61 *Cong. Rec.* 4646-4654 (Aug. 4, 1921); 61 *Cong. Rec.* 4760-4771 (Aug. 9, 1921); 61 *Cong. Rec.* 5027-5031 (Aug. 15, 1921); 61 *Cong. Rec.* 5518-5520 (Aug. 23, 1921); 61 *Cong. Rec.* 5555-5562 (Aug. 23, 1921).

In this regard, section 5(d) stands in sharp contrast to the express private remedies created in the Packers and Stockyards Act of 1921, which became law during the same month of 1921 as the Future Trading Act, and which was written by the same congressional committees. (Act of August 15, 1921, ch. 64, 42 Stat. 159).[11] Section 308 of the Packers and Stockyards Act provided that any stockyard, market agency, or dealer that violates specified sections of the Act "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation"; and that such liability may be enforced either by suit in a federal district court or by complaint to the Secretary of Agricul-

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[10] (Continued)

1922: H. R. Rep. No. 1095, 67th Cong., 2d Sess. (1922); S. Rep. No. 871, 67th Cong., 2d Sess. (1922); 62 *Cong. Rec.* 9175-9178 (June 22, 1922); 62 *Cong. Rec.* 9403-9450 (June 26, 1922); *Hearings Before the Senate Comm. on Agriculture & Forestry on H. R. 11843*, 67th Cong., 2d Sess. (1922); 62 *Cong. Rec.* 12564-12568 (Sept. 14, 1922); 62 *Cong. Rec.* 12720-12725 (Sept. 15, 1922).

1936: H. R. Rep. No. 421, 74th Cong., 1st Sess. (1935); 79 *Cong. Rec.* 8586-8595 (June 3, 1935); 79 *Cong. Rec.* 14246 (Aug. 23, 1935); 80 *Cong. Rec.* 6159-6164 (April 27, 1936); 80 *Cong. Rec.* 6612-6613 (May 4, 1936); 80 *Cong. Rec.* 7845-7883 (May 25, 1936); 80 *Cong. Rec.* 7905-7912, 7916-7918 (May 26, 1936); 80 *Cong. Rec.* 8010-8090 (May 27, 1936); 80 *Cong. Rec.* 8288-8293 (May 29, 1936); 80 *Cong. Rec.* 8824-8825 (June 3, 1936); *Hearings Before the Senate Comm. on Agriculture & Forestry on H. R. 6772*, 74th Cong., 2d Sess. (1936).

[11] See H. R. Rep. No. 77, 67th Cong., 1st Sess. 1, 11 (1921); H. R. Rep. No. 324, 67th Cong., 1st Sess. (1921). See also *Stafford* v. *Wallace*, 258 U.S. 495, 499 (1922); G. O. Virtue, "Legislation for the Farmers: Packers and Grain Exchanges," 37 *Quar. J. of Econ.* 687, 693 (1923).

ture as provided in section 309 of the Act.[12] (42 Stat. 165). Clearly Congress, even in 1921, knew precisely how to (and did) create private causes of action, *when it intended to do so.* See *Redington,* 442 U.S. at 572; *Transamerica Mortgage,* 444 U.S. at 20-21.

Congress was not unmindful, however, of the need to provide machinery for the enforcement of section 5(d) of the Commodity Exchange Act. As the Senate sponsor stated in 1921: "When it comes to the matter of enforcing the law, that power must be in some one. It would be absurd to enact a law without providing for its enforcement." 61 *Cong. Rec.* 4764 (Aug. 9, 1921) (remarks of Sen. Capper). Thus enforcement was expressly vested in a three-member federal commission (now the five-

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[12] Section 309 created an administrative reparations system whereby the Secretary could award monetary damages. Sections 308 and 309, as amended, are codified at 7 U.S.C. §§209, 210. Provisions similar to sections 308 and 309 are contained in the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. §§449e, 499f, and 499g). See H. R. Rep. No. 1041, 71st Cong., 2d Sess. 4 (1930); H. R. Rep. No. 1704, 71st Cong., 2d Sess. 4 (1930). In 1974 Congress obviously borrowed from section 309 and these analogous provisions in the Perishable Agricultural Commodities Act (7 U.S.C. §§499f and 499g) in creating an administrative reparations system under the Commodity Exchange Act. See *Hearings Before the House Comm. on Agriculture on H. R. 11955,* 93d Cong., 2d Sess. 253 (n.1) (testimony of C. W. Chapin) (1974); *Hearings Before the Senate Comm. on Agriculture & Forestry on S.2485, S.2578, S.2837 & H. R. 13113,* 93d Cong., 2d Sess. 565 (1974) (testimony of B. H. Jones); Valdez, "Modernizing the Regulation of Commodity Futures Markets," 13 *Harv. J. Legis.* 35, 60 (1975). See also note 25, *infra.* Commodity exchanges and their officials are exempted from this system, however. Commodity Exchange Act, §14 (7 U.S.C. §18).

member CFTC), which was empowered to revoke or suspend an exchange's contract-market designation. See 42 Stat. 188, 1001; Commodity Exchange Act, §6 (7 U.S.C. §8); *Leist*, 638 F.2d at 293.[13]

The scope and purpose of section 5(d) as a licensing requirement is made manifest by actions taken in 1925 by the Secretary of Agriculture and the commodity exchanges then operating under federal designation. The Secretary indicated at that time that, in view of section 5(d), the exchanges would have to set up certain "administrative machinery" if they were to continue to maintain their contract market designations. In a 1926 report to the Secretary of Agriculture, the Administrator of the Grain Futures Act advised the Secretary that the exchanges "showed an excellent spirit of cooperation, and that these proposed reforms have been put into effect." Sen. Doc. No. 135 ("Fluctuations in Wheat Futures"), 69th Cong., 1st Sess. 13 (1926). Thus the exchanges had set in place the "administrative machinery" deemed necessary by the Secretary for compliance with section 5(d).

B. The 74th Congress (1936) Did Not Intend To Create, By Implication, A Private Cause of Action Under Section 9(b).

The Commodity Exchange Act's criminal penalty for manipulation, now contained in section 9(b) [7 U.S.C. §13(b)], was added to the Act in 1936. (Act of June

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[13] The constitutionality of the Act provision authorizing revocation or suspension of "contract market" designation (§6) was upheld in 1933 in *Board of Trade of the City of Chicago* v. *Wallace*, 67 F.2d 402, 407 (7th Cir. 1933), cert. denied, 291 U.S. 680 (1934). See H. Mayers, Federal Regulatory Legislation, the Federal Grain Futures Act," 2 *Geo Wash. L. Rev.* 457, 461 (1934).

19, 1936, ch. 545, §11, 49 Stat. 1501).[14] Although the Act's criminal provision (section 9) has been amended on subsequent occasions, the language relating to manipulation has not been substantially altered.[15]

By its plain terms, section 9(b) simply creates *criminal* sanctions against the manipulator. Section 9(b) clearly does not apply to an *exchange's* failure to *prevent* manipulation. In any event, there is nothing in the legislative history of the 1936 amendments which suggests that Congress intended to create, by implication, a private cause of action under section 9(b) against an exchange

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[14] As enacted in 1922, the Act's criminal provision (section 9) did not prescribe any criminal penalty for manipulation, although administrative proceedings could be brought for manipulation [section 6(b)]. See 42 Stat. 1002, 1003. The 1922 provision was adopted largely verbatim from section 10 of the Future Trading Act of 1921 (see 42 Stat. 191). [See note 7 and accompanying text concerning the 1921 Act and its reenactment in 1922 as the Grain Futures Act. See also Campbell, "Trading in Futures Under the Commodity Exchange Act," 26 *Geo. Wash. L. Rev.* 215, 244 (1958)].

[15] The 1936 amending act added the following language to section 9 of the Act regarding manipulation: "[any person who shall] manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any board of trade, or who shall corner or attempt to corner any such commodity" [shall be deemed guilty of a misdemeanor, punishable by a maximum penalty of one year in prison and a $10,000 fine]. In 1968, the reference to "board of trade" was changed to "contract market"; the offense of manipulation was upgraded to a felony; and the maximum prison term was increased to five years. (Pub. L. No. 90-258, §18, 82 Stat. 31). In 1974, the maximum fine was increased to $100,000. [Pub. L. No. 93-463, §212(d)(2), 88 Stat. 1404]. In 1978, the maximum fine was increased to $500,000 for organizations. [Pub. L. No. 95-405, §19(2), 92 Stat. 875].

and its officials for market manipulation. In fact, the notion of implied causes of action against *anyone* for *any* violation of the Act was never considered.[16]

Consideration was again given, however, to the question of enforcement of the Act with respect to the commodity exchanges. To provide for greater enforcement flexibility, section 6b was added to authorize, in lieu of suspension or revocation of contract-market designation, the issuance of cease and desist orders against an exchange and its officials, with *criminal* sanctions for noncompliance with such orders. Commodity Exchange Act, §6b (7 U.S.C. §13a), Act of June 15, 1936, ch. 545, §9, 49 Stat. 1500. See H.R. Rep. No. 421, 74th Cong., 1st Sess. 8 (1935). This new section was added "to provide a method by which the degree of punishment may be measured against the degree f violation. It protects the interests of the producers and traders, *while at the same time it provides an adequate penalty for violations of the act.*" 80 *Cong. Rec.* 7859 (May 25, 1936) (remarks of Sen. Murray) (emphasis added). See also "Legislation: the Commodity Exchange Act of 1936," 85 *Univ. Pa. L. Rev.* 614, 621 (1937).

C. The 90th Congress (1968) Did Not Intend To Create, By Implication, A Private Cause of Action Under Section 5a(8).

Section 5a(8) [7 U.S.C. §7a(8)] was added to the Commodity Exchange Act in 1968, by section 12(b) of

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[16] See legislative materials cited at note 10. See also *Leist*, 638 F.2d at 337-38 (Mansfield, J., dissenting). It should be noted that this provision was also enacted well before the "judicial rush" to imply private causes of action. See *Leist* at 296; also at 344 (Mansfield, J., dissenting). Regarding the implication of private causes under criminal provisions, see *Transamerica Mortgage*, 444 U.S. at 19 (basis for implication lacking).

H. R. 13094 (Pub. L. No. 90-258, 82 Stat. 29).[17] Nothing in the legislative history of H.R. 13094 indicates any congressional intent to create a private cause of action under section 5a(8).[18] H.R. 13094 was, in fact, "a rather innocuous bill" containing "modest proposals." 113 *Cong Rec.* 34404, 34405 (Nov. 30, 1967) (remarks of Rep. Sullivan).

To the contrary, there is clear evidence that Congress expressly intended *not* to create a private cause of action under section 5a(8). H.R. 13094 was modeled closely on H.R. 9178, introduced by Representative Fino on April 26, 1967. See 113 *Cong. Rec.* 10838 (April 26, 1967) (remarks of Rep. Fino).[19] Representative Fino's bill contained a section that would have created an express private cause of action against commodity exchanges:

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[17] In 1974, a technical amendment was made to section 5a(8) to reflect the creation of the new CFTC and the powers granted to it under new section 5a(12) requiring affirmative CFTC approval of exchange rules relating to contract terms and other trading requirements. Otherwise, the substance of section 5a(8) was not altered. Commodity Futures Trading Commission Act of 1974, sec. 407, Pub. L. No. 93-463, 88 Stat. 1389.

[18] See S. Rep. No. 947, 90th Cong., 2d Sess. (1968); H. R. Rep. No. 743, 90th Cong., 1st Sess. (1967); *Hearings Before the House Committee on Agriculture on H. R. 11930 and 12317*, 90th Cong., 1st Sess. (1967); 113 *Cong. Rec.* 10838 (Apr. 26, 1967), 23650 (Aug. 22. 1967), 34206 (Nov. 26, 1967), 34390, 34403 (Nov. 30, 1967); 114 *Cong. Rec.* 592 (Jan. 23, 1968), 2012 (Feb. 5, 1968). See also *Hearings Before the House Committee on Agriculture, Subcommittee on Domestic Marketing and Consumer Relations, on H.R. 11788*, 89th Cong., 2d Sess. (1966).

It must be noted also that section 5a(8), like section 5(d), is a licensing requirement. See note 9.

[19] The close similarity of the two bills was noted in *Leist*, 638 F.2d at 339 n. 11 (Mansfield, J., dissenting).

> Any contract market which engages in any act or practice constituting a violation of this Act, or any rule or order thereunder, or which negligently allows or aids, abets, counsels, commands, or induces any such violation, *shall be liable for consequential damages to any aggrieved person.* [Section 32 of H.R. 9178 (emphasis added)].

This section, however, was one of the few provisions of H.R. 9178 that was *not* incorporated in H.R. 13094, and thus was not enacted into law in 1968.

Moreover, the amendments accompanying the adoption of section 5a(8) further show that the 90th Congress did not intend to create a private cause of action under the section. Specifically, the adoption of section 5a(8) was so closely related to the adoption of three amendments substantially strengthening the government's ability to enforce section 5a generally that it is inconceivable that Congress intended private causes to be implied under section 5a(8) against commodity exchanges and their officials.

These amendments were as follows:

1. *Section 6b.* This provision was amended so that the Commodity Exchange Commission ("CEC") —one of the predecessors of the CFTC—could enforce the various requirements imposed on commodity exchanges by section 5a *both* by issuing a cease and desist order and by bringing a proceeding to suspend or revoke designation. (H.R. 13094, section 18). (See S. Rep. No. 947 at 10; see also the text following note 16, *supra*).

2. *Section 6(a).* This provision was expanded to empower the CEC to suspend or revoke a contract market's designation for the failure of a

contract market's officer, director, employee or agent to comply with any section 5a requirement. (H.R. 13094, section 15). (See S. Rep. No. 947 at 9).

3. *Section 2(a).* This provision was amended to make the CEC a more effective regulatory body. The amendment permitted the CEC's members, who were the Secretaries of Agriculture and Commerce and the Attorney General, to designate employees of their departments to serve in their place. [H.R. 13094, section 1(c).] (See S. Rep. No. 947 at 5).

The close relationship between the new requirement imposed by section 5a(8) and the broadening of the provisions for CEC enforcement of that requirement was noted during the hearings on the 1968 amendments:

> The upshot of section 5a(8), section 6(a), and section 6b, when read together, is that full responsibility is thrust upon the [contract] market and its employees for enforcing the Commodity Exchange Act and rules approved by the Secretary, *or they shall suffer the penalties attached thereto.* [*House Hearings on H.R. 11930 and 12317* at 37 (testimony of W. Theis, President, Kansas City Board of Trade) (emphasis added).]

D. In Amending the Commodity Exchange Act in 1974, the 93d Congress Did Not Intend to Create, By Implication, A Private Cause of Action Under Section 5(d), Section 5a(8), or Section 9(b).

In 1974 Congress enacted a number of significant amendments to the Commodity Exchange Act. H. R. 13113, Commodity Futures Trading Commission Act of

1974, Pub. L. 93-463, 88 Stat. 1389. Section 5(d), however, was not altered in any way; only technical, conforming amendments were made to section 5a(8); and, while section 9(b) was amended in some respects, its language relating to market manipulation was not changed.[20]

In connection with the 1974 amendments, the 93d Congress did have before it and did give serious consideration to several specific provisions relating to private causes of action, including actions against commodity exchanges under sections 5(d), 5a(8), and 9(b). None of these provisions was enacted into law. The bills which would have provided for private causes of action were:

—Representative Smith's bill, H. R. 11195;[21]

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[20] See notes 7, 15, 17; see also *Leist*, 638 F.2d at 295.

[21] Section 17(3), H. R. 11195, 93d Cong., 1st Sess. (1973); see also 119 *Cong. Rec.* 35483 (Oct. 30, 1973) (referral of H. R. 11195 to the House Comm. on Agriculture); *Hearings Before the House Comm. on Agriculture on H. R. 11955*, 93d Cong., 2d Sess. 1 (remarks of Ch. Poage), 2-11 (testimony of Rep. Smith) (1974); *Hearings Before the Senate Comm. on Agriculture & Forestry on S.2485, S.2578, S.2837 and H.R. 13113*, 93d Cong., 2d Sess. 207-210 (1974) (testimony of Rep. Smith). Bills identical to H.R. 11195 were introduced by Representative Smith on November 7, 1973 [H.R. 11323, for himself and 23 co-sponsors (see 119 Cong. Rec. 36272) (Nov. 7, 1973) (referral to Comm. on Agriculture); and H.R. 11338, for himself and 20 co-sponsors (see 119 *Cong. Rec.* 36273) (Nov. 7, 1973) (referral to Comm. on Agriculture)] and on November 15, 1973 [H.R. 11538, for himself and 8 co-sponsors (see 119 *Cong. Rec.* 39191) (Nov. 15, 1973) referral to Comm. on Agriculture)]. All references to H.R. 11195 or "the Smith bill" in the following pages are intended to include H.R. 11323, 11338, and 11538 as well.

—Senator McGovern's bill (for himself and Senators McIntyre and Abourezk, S.2578;[22] and

—Senator Hart's bill (for himself and Senators Scott, Case, and Clark), S.2837.[23]

The Smith and McGovern bills, in identical language, would have authorized civil actions for treble damages against any person violating the Commodity Exchange Act or regulations thereunder. The Hart bill would have authorized civil actions for restitution (single damages) for any injury caused by a violation of the Act or of

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[22] Section 20(3), S.2578, 93d Cong., 1st Sess. (1973), printed at 119 *Cong. Rec.* 33948 (Oct 12, 1973) and at *Hearings Before the Senate Comm. on Agriculture & Forestry on S.2485, S.2578, S.2837 and H.R. 13113*, 93d Cong., 2d Sess. 76-77 (1974); see also 119 *Cong. Rec.* 33943 (Oct. 12, 1973) (referral of S.2578 to the Senate Comm. on Agriculture & Forestry); 119 *Cong. Rec.* 33943-33945 (Oct. 12, 1973) (remarks of Sen. McGovern); 119 *Cong. Rec.* 36104 (Nov. 7, 1973) (addition of co-sponsors); 119 *Cong. Rec.* 36776 (Nov. 13, 1973) (remarks of Sen. McGovern); *Hearings on S.2578* at 195-197 (testimony of Sen. McGovern). Representative Smith's bill (H.R. 11195) was substantially identical to this bill.

[23] Section 505, S.2837, 93d Cong., 1st Sess. (1973), printed at 119 *Cong. Rec.* 42688 (Dec. 20, 1973) and at *Hearings Before the Senate Comm. on Agriculture & Forestry on S.2485, S.2578, S.2837 and H.R. 13113*, 93d Cong., 2d Sess. 118-120 (1974); see also 119 *Cong. Rec.* 42677 (Dec. 20, 1973) (referral of S.2837 to the Senate Comm. on Agriculture & Forestry); 119 *Cong. Rec.* 42681-42689 (Dec. 20, 1973) (remarks of Sen. Hart); *Hearings Before the House Comm. on Agriculture on H.R. 11955*, 93d Cong., 2d Sess. 237-243 (1974) (testimony of Sen. Clark); 120 *Cong. Rec.* 1899-1901 (Feb. 4, 1974) (remarks of Sen. Hart); 120 *Cong. Rec.* 13941-13951 (May 9, 1974) (remarks of Sen. Hart); 120 *Cong. Rec.* 13967-13969 (May 9, 1974) (remarks of Sen. Clark); *Hearings on S.2837* at 200-206 (testimony of Sen. Clark).

any rule, regulation or order of the Commission or an exchange, and treble damages for any "wilful" violation.

Although Representative Smith's bill, H.R. 11195, was referred to the House Agriculture Committee on October 30, 1973 (see 119 *Cong. Rec.* 35483), hearings were never held on that bill. Instead, hearings were held in January of 1974 on H.R. 11955, which had been introduced by the Chairman of the House Agriculture Committee (Mr. Poage, on behalf of himself and members of a special ad hoc subcommittee) on December 13, 1973 (see 119 *Cong Rec.* 4133).

It is clear, however, that the Smith bill (H.R. 11195) was the model for H.R. 11955. Chairman Poage, at the beginning of the January 1974 hearings, expressly acknowleged the contributions of Representative Smith and made specific reference to H.R. 11195. Representative Smith was the first witness at these hearings, and observed at the outset that "[t]he new bill which the Committee introduced on December 13, H.R. 11955, is identical or very similar to H.R. 11195 which I had introduced on October 30 in a vast majority of its provisions." *Hearings Before the House Comm. on Agriculture on H.R. 11955,* 93d Cong., 2d Sess. 1 (remarks of Ch. Poage), 2 (testimony of Rep. Smith) (1974).[24]

Representative Smith's provision relating to private causes of action was one of the few provisions of his bill which was *not* incorporated in Chairman Poage's bill (H.R. 11955). Instead—and obviously borrowing from the

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[24] Set forth below is a list of the many sections of the Poage bill (H.R. 11955) that were identical to, or substantially the same as, provisions of the Smith bill (H.R. 11195) [and which was substantially identical to the McGovern bill (S.2578)].

Packers and Stockyards Act of 1921 and the Perishable Agricultural Commodities Act of 1930[25]—an administrative reparations system was proposed (and subsequently enacted into law). Commodity exchanges and their officials were (and are) expressly exempted from this system.[26]

In borrowing from the Packers and Stockyards Act and the Perishable Agricultural Commodities Act,[27] however, Chairman Poage and his special ad hoc subcommittee did *not* borrow from the provisions of these Acts which expressly authorize private damage suits in federal courts, as well as administrative reparations.[28]

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[24] (Continued)

H.R. 11955 (Poage)	H.R. 11195 (Smith)	H.R. 11955 (Poage)	H.R. 11195 (Smith)
101	12, 15, 16	212	1
102	13	213	3
103	14	215	3 (proviso)
104	20	510	22
201	5	511	22
204	18	*Compare also*	
207	11	203	8
209	6 (1st ¶)	205	9
211	2	208	3

[25] For example, *compare* 7 U.S.C. §§499f & 499g *with* section 105, H.R. 11955, 93d Cong., 1st Sess. (1973), printed at *Hearings Before the House Agriculture Comm. on H.R. 11955*, 93d Cong., 2d Sess. 341-47 (1974). See also note 12 and accompanying text.

[26] Commodity Exchange Act, §14 (7 U.S.C. §18).

[27] See 7 U.S.C. §§209, 499e; see also note 12.

[28] A cause of action was *not* implied under sections of the Packers and Stockyards Act not specified in Section 308. *Pacific Trading Co.* v. *Wilson & Co.*, 547 F.2d 367 (1976). Section 308 (7 U.S.C. §209) was amended in 1976 to apply to any *person* who violates *any* provision of that Act. Pub. L. No. 94-410, §6, 90 Stat. 1250. [See Sen. Rep. No. 94-932, 94th Cong., 2d Sess. 2, 7 (1976)].

As a result of the January 1974 hearings, a revised H.R. 11955 was introduced on February 27, 1974 by Chairman Poage (under the co-sponsorship of Representative Smith) as H.R. 13113 (93d Cong., 2d Sess). Once again, Representative Smith's provision relating to private causes of action was not incorporated. The provision for reparations in lieu of private suits remained intact, however.

H.R. 13113 passed the House on April 11, 1974. (See 120 *Cong. Rec.* 10736-10769). Thereafter, in May of 1974, hearings were held by the Senate Agriculture and Forestry Committee on H.R. 13113, and also on the McGovern and Hart bills (S.2578 and S.2837) and a bill which Senator Humphrey had introduced (S.2485).[29]

Following these hearings on S.2485, S.2578, S.2837, and H.R. 13113, the Senate Agriculture and Forestry Committee reported favorably on H.R. 13113, but with an amendment in the nature of a substitute. See Sen. Rep. No. 93-1131, 93d Cong., 2d Sess. 1 (1974); H.R. 13113, 93d Cong., 2d Sess. [Calendar No. 1080 (August 29, 1974)]. The Senate Substitute Bill reflected a thorough consideration of all four bills which had been the subject of the May hearings, including the Hart bill (S.2837) which provided for single and treble damage actions. See Sen. Rep. No. 93-1131 at 20.

In fact, no less than four provisions of the Hart bill (S. 2837) were incorporated substantially verbatim in the

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[29] Like the Poage bill (H.R. 11955 and, as revised, H.R. 13113), the Humphrey bill contained no provision relating to private causes of action. Once again, it should be noted that the McGovern bill (S.2578) was substantially identical to the Smith bill (H.R. 11195), on which the Poage bill (H.R. 11955) was modeled (see note 22).

Senate Substitute Bill. These provisions related to exchange disciplinary decisions,[30] market reporting,[31] daily trading reports,[32] and investor protection.[33] The Senate Committee, however, did not incorporate into its Substitute Bill the provision in the Hart bill (S.2837, section 505) authorizing damage actions for violations of the Act.

At the time of both the Senate and House deliberations in 1974 which led to adoption of H.R. 13113 as the Commodity Futures Trading Commission Act of 1974, this Court had already decided *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974), the *Amtrak* case, which recited with favor the principle of *expressio unius est exclusio alterius* in denying an implied cause of action under 45 U.S.C. §547.[34]

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[30] Section 216 of the Senate Substitute Bill: derived substantially verbatim from section 203 of S.2837. [For the text of section 203, see *1974 Sen. Hearings* at 94-96. See also Commodity Exchange Act, section 8c (7 U.S.C. §12c)]

[31] Section 314: derived substantially verbatim from section 211 of S.2837. [See *1974 Sen. Hearings* at 102. See also Commodity Exchange Act, section 16 (7 U.S.C. §20)].

[32] Section 315: derived substantially verbatim from section 208(b)-(d) of S.2837. [See *1974 Sen. Hearings* at 99-100. See also Commodity Exchange Act, section 4g(2)-(6) (7 U.S.C. §6g(2)-(6))]

[33] Section 316: derived substantially verbatim from §303(a)(2) of S.2837. (See *1974 Sen. Hearings* at 104-105). (This provision was deleted in Conference).

[34] 414 U.S. at 458. The *Amtrak* case was decided on January 9, 1974. House Agriculture Committee hearings on the Poage bill were held on January 23-31, 1974. Senate Hearings were held on May 13-22, 1974. Final

The result in *Amtrak* was reached notwithstanding the fact (as Mr. Justice Douglas noted in a vigorous dissent) that the case was "on all fours" (and thus its holding was incompatible) with *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), the seminal case supporting implication of private causes of action under the federal securities laws. 414 U.S. at 471-72 (Douglas, J., dissenting).

Possibly in recognition of the particular significance of the *Amtrak* decision, Professor Roy Schotland of the Georgetown University Law Center urged, in his May, 1974 testimony before the Senate Agriculture Committee with regard to the reparations system contained in the Poage bill (H.R. 13113), that "if you do choose to retain any such virtually unprecedented responsibility and burden in this regulatory body, there should be explicit language in the statute that federal and state courts are still open if a complainant prefers to go to trial there." At the same time, Professor Schotland "enthusiastically" endorsed the provision in the Hart bill (S.2837, section 505) which would have authorized private civil suits for single and treble damages. *Hearings Before the Senate Comm. on Agriculture & Forestry on S.2485, S.2578, S.2837, and H.R. 13113*, 93d Cong., 2d Sess. 737-746 (1974). The Senate Committee, however, did not follow Professor Schotland's advice. While the reparations system was maintained, no language was added authorizing suits at law as well. Nor was section 505 of the Hart bill

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[54] (Continued)
legislative action was not taken until October 10, 1974, some 10 months after the *Amtrak* decision. See 120 *Cong. Rec.* 34995-35003 (conference report agreed to by Senate).

(S.2837) incorporated into the Substitute Bill reported by the Senate Committee.[35]

H.R. 13113, as amended, passed the Senate on September 9, 1974. (See *120 Cong. Rec.* 30458-30468). Following conference, final legislation was enacted on October 10, 1974 (see 120 *Cong. Rec.* 34995-35003) which created a reparations system but made no provision to create private causes of action at law, either along the lines proposed by Representative Smith and Senators McGovern and Hart, or as provided for in the Packers and Stockyards Act of 1921 and the Perishable Agricultural Commodities Act of 1930.[36]

E. In Amending the Commodity Exchange Act in 1978, the 95th Congress Did Not Intend to Create, By Implication, A Private Cause of Action Under Section 5(d), Section 5a(8), or Section 9(b).

The 1974 amendments to the Commodity Exchange Act included a so-called "sunset" provision (see 88 Stat. 1391) which resulted, in 1978, in extensive congressional review of the Act and of CFTC operations. A number of amendments to the Act were made as a result of this review. (Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865).

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[35] Undoubtedly Professor Schotland was also aware that the Court in *Amtrak* had also placed great weight on the fact that a proposal had been before the responsible congressional committee to amend the provision there in question, to expressly provide for a private cause of action, and that the proposal had not been adopted. See 414 U.S. at 458-461.

[36] For additional analysis of the legislative history of the 1974 amendments as they relate to the issue of private causes of action, see *Leist,* 638 F.2d at 344-47 and 351-53 (Mansfield, J., dissenting).

No provision was enacted, however, to create a private cause of action against exchanges or their officials, and none was considered. A provision was enacted [section 6d of the Act (7 U.S.C. §13a-2)] to authorize suits by state officials for violations of the Act, in order, among other things, "to obtain damages on behalf of their residents." Exchanges and their officials are expressly exempted from this provision, however. In the words of the House Agriculture Committee:

> The power to enforce the requirements of the Act with respect to the organized exchanges remains *solely* with the Commission. [H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. 15-16 (1978) (emphasis added)]

Sections 5(d) and 5a(8) were not altered in any way by the 1978 amendments. While section 9(b) was altered in some respects, its language relating to market manipulation was not changed.[37] Thus there is no evidence which suggests that the 95th Congress intended to create, by implication, a private cause of action under section 5(d), 5a(8), or 9(b).[38]

This analysis of the specific legislative histories of sections 5(d), 5a(8), and 9(b) of the Commodity Exchange Act, as well as amending legislation enacted in 1974 and 1978, clearly establishes that Congress did not intend to create, by implication, private causes of action under those provisions against commodity exchanges and their officials. To the contrary, Congress has assiduously avoided creating such causes on several occasions, while

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[37] See notes 7, 15, 17; see also *Leist*, 638 F.2d at 295.

[38] For additional analysis of the legislative history of the 1978 amendments as they relate to the issue of private causes of action, see *Leist*, 638 F.2d at 353-54 (Mansfield, J., dissenting).

enacting many other provisions of bills which would have done so. Moreover, while obviously borrowing from other statutes in important respects, it has *not* borrowed from related provisions in those statutes which expressly create private causes.[39]

F. Implying A Private Cause of Action Against A Commodity Exchange and Its Officials Would Frustrate the Underlying Purpose of The Legislative Scheme.

Congress' clear intention *not* to create a private cause of action against commodity exchanges and their officials is further evidenced by an analysis of the scheme of the Commodity Exchange Act. This analysis is particularly relevant because a private cause of action "should not be implied if it would frustrate the underlying purpose of the legislative scheme." *Cannon,* 441 U.S. at 703. Such would be the result, however, if private causes of action are implied against commodity exchanges and their officials under the Commodity Exchange Act.

Congress has designed the Commodity Exchange Act "to provide a uniform regulatory structure covering all futures trading . . . [and] to allow for the extension of

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[39] Thus, implying private causes under these circumstances raises important questions of constitutional law. Article I of the Constitution vests legislative powers exclusively in Congress. And Congress has repeatedly refrained from providing any private cause of action against commodity exchanges and their officials under any provision of the Commodity Exchange Act. See *Cannon* v. *University of Chicago,* 441 U.S. 677, 730 (1979) (Powell, J., dissenting). See also *Wilson* v. *First Houston Investment Corp.,* 566 F.2d 1235, 1243-45 (5th Cir. 1978) (Hill, J., dissenting), *vacated* (and remanded for further consideration in light of *Transamerica Mortgage*), 444 U.S. 959 (1979).

the economic benefits of futures trading under this structure to those areas of commerce where the risk-shifting and price-discovery functions of futures markets might prove to be of value." [Sen. Rep. No. 95-850, 95th Cong., 2d Sess. 10 (1978)].

So designed, the Act constitutes an elaborate legislative scheme in which Congress has provided a "pervasive panoply of judicial and administrative means for enforcing compliance with the Act".[40] These include civil fines, compensatory reparations, arbitration, cease and desist orders, injunctive and emergency orders, and criminal penalties. At the same time, however, Congress has expressly recognized and codified the critical, central role of the commodity exchanges. See, *e.g.*, 7 U.S.C. §§6; 6b; 6c; 6f; 6g; 6h; 7; 7a; 12a(6); 12a(9); 12c.

Operating under pervasive CFTC *oversight*, exchange self-regulation remains the first line of defense of the legislative scheme. Self-regulation is, as Congress recognized in 1974, a concept which "has been followed by the exchanges since their inception, *and continually encouraged by the Congress.*" [H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 44 (1974) (emphasis added)]. As Congress also recognized in 1974, self-regulation operates under a system of commodity exchange rules or bylaws which are "descriptive of 'ideal industry practice.'" The role of the exchanges is to "encourage their members to strive toward that ideal." [H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 45 (1974)]. For that reason, "nearly all [commodity] exchanges have nebulous rules prohibiting [for example] 'inequitable conduct' or 'unbusinesslike dealings.'" [Id.]

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[40] *Leist*, 638 F.2d at 323 (Mansfield, J., dissenting).

In this environment, the potential for mischief through private actions testing the sufficiency of self-regulatory efforts is obvious. Scores of different district courts may be called upon, not only to render their own interpretations of commodity exchange rules, but also to decide the quantum of self-regulatory vigor to be expected of the exchanges. Such a result is diametrically opposed to the plan of centralized, uniform regulation embodied in the Commodity Exchange Act. Indeed, Congress in 1974 gave the CFTC a rare grant of "exclusive jurisdiction" over the exchanges *vis-a-vis* other federal and state regulatory agencies (7 U.S.C. §2), for the express purpose of assuring that "the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings." [120 *Cong. Rec.* 30459 (September 9, 1974) (remarks of Sen. Talmadge)].

Congress also gave the CFTC authority in 1974 to review and change all pertinent exchange rules, to examine exchange self-regulatory activities, and to assess civil penalties against an exchange and its officials for violating the Act or CFTC rules or orders. In granting this latter authority to the CFTC, Congress expressly mandated that, in determining the amount of penalty, the CFTC must consider whether the amount will "materially impair" the exchange's "ability to carry on its operations and duties." [Section 6b (7 U.S.C. §13a)]. Federal courts, of course, are not subject to these constraints and could award damages that "materially impair," if not destroy, the ability of a commodity exchange to carry on its important operations and duties.

The CFTC's review and enforcement powers are clearly adequate to protect the public. In addition, these powers promote the uniformity insisted upon by Congress and

also assure that the vital price-discovery and risk-shifting functions of futures markets will continue unimpaired. Under this scheme, there simply is no need, or place, for private suits.

Also, the nature of exchange and exchange-related "violations" of the Commodity Exchange Act differs sharply from the type of misconduct generally outlawed by the Act. To the extent that an exchange and its officials fall short of effective self-regulation in a specific instance, they inflict no direct injury upon the public. Rather, the injury results from the actions of others which the exchange and its officials did not (and, more likely, *could not*) prevent.

Moreover, the imposition of private liability is incompatible with the law-enforcement role which exchanges and their officials—who, in most instances, are uncompensated volunteers—must perform under the Commodity Exchange Act. If the scheme of the Act is to be maintained—and not be frustrated—commodity exchanges and their officials must conduct their investigative efforts under the Act in a vigorous and conscientious manner without regard to whether the evidence accumulated by them might aid plaintiffs in suits against them or weaken their own defense against damage claims. They must act as or serve on impartial disciplinary tribunals under the Act and reach objective decisions of guilt or innocence without regard to whether their decisions buttress a plaintiff's case against them or jeopardize their defense.

In addition to being able to perform their law-enforcement responsibilities in a vigorous and conscientious manner, without fear of the consequences, commodity exchanges and their officials must be free to set strict and comprehensive standards of conduct, even though a higher

"failure rate" of compliance can be expected, without fear that their less-than-perfect regulatory record will expose them to massive private damage liability. They must be free to enlist the services of dedicated and talented members and staffs to administer their self-regulatory programs, without exposing them to the unacceptable risks of personal liability to private parties. And most fundamentally, they must be free to devote limited exchange resources to self-regulation as mandated by the Commodity Exchange Act, *not* to the costly defense of private damage actions.

These many factors, we submit, underlie Congress' repeated refusal to create private causes of action against commodity exchanges and their officials, and refute any suggestion that Congress somehow could have "intended" that such causes should be implied by the courts.

CONCLUSION

The EXCHANGES, as *amici curiae,* respectfully urge that the decision of the United States Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

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